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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH
CENTRAL DIVISION

LINDA P. SMITH,

Plaintiff

Case No. 1:21-cv-00047-HCN-DBP

v.

XAVIER BECERRA, in his capacity
as the Secretary of the United States
Department of Health and Human
Services,

Defendant

PLAINTIFF'S RESPONSE TO
COURT'S ORDER OF OCTOBER
14, 2021

JURY TRIAL DEMANDED

Judge Howard Nielson, Jr.
Magistrate Judge Dustin B. Pead

Pursuant to this Court's Order of October 14, 2021, Plaintiff files this response. The parties conferred on October 18, 2021, but were unable to come to agreement. While the Court's Order of October 14, 2021, was for a joint filing, the Secretary has declined to participate in this filing (Plaintiff understands that the Secretary intends to file a separate paper).

At the hearing held on August 10, 2021 (*see* Dkt. # 22), this Court provided for separate briefs as to the issues of collateral estoppel and the illegal issuance of CMS 1682-R. Further, at the Secretary's request, the Court allowed replies/sur-replies on anticipated cross-motions and provided a schedule for opening briefs/oppositions. In accordance with the schedule ordered by this Court, on September 7, 2021, Plaintiff filed two motions for summary judgment – one for each of the issues. *See* Dkt. #28 and 29.

Apparently, the Secretary did not like this Court's Order for separate briefing. Thus, on September 21, 2021, the Secretary filed two, identical copies of the same "combined" paper. *See* Dkt. #31 and 32. That paper was entitled: "Defendant's Cross-Motion for Summary Judgment and Opposition to Plaintiff's Motions for Summary Judgment." Whether the Secretary was seeking summary judgment of one issue or both was less than clear but the paper itself appeared to comply with the Local Rule requirements only with respect to the issue of collateral estoppel and Plaintiff therefore treated only that issue as a "cross-motion."

Accordingly, on October 5, 2021, Plaintiff filed papers responsive to each of her motions. One, was entitled: “Plaintiff’s Reply in Support of Motion for Summary Judgment Based on Collateral Estoppel/Opposition to Cross-Motion.” *See* Dkt. #38. The other was entitled: “Reply in Support of Motion for Summary Judgment and to Vacate.” *See* Dkt. #37.

Thus, under this Court’s Local Rules and the Order of August 10, 2021, any reply on the Secretary’s cross-motion related to collateral estoppel motion would be due on October 19, 2021. Because there was no cross-motion on CMS 1682-R, the briefing is complete.

Thus, the schedule has been proceeding exactly as the Secretary requested and the Court ordered. Nevertheless, Plaintiff understands that the Secretary now objects to the very procedure he requested and seeks more time and more briefs.

Plaintiff does not oppose the Secretary filing another brief related to collateral estoppel on October 19, 2021, in accordance with the schedule he requested and the Court ordered.

Plaintiff does oppose further briefing on CMS 1682-R. Any confusion on the Secretary’s part is a result of his defiance of the Court’s Order on separate briefing and disregard of Plaintiff’s responses. Further, the Secretary’s contention that Plaintiff raised “new” arguments in her reply on CMS 1682-R is false. Instead, Plaintiff directly responded to the Secretary’s defense and did not raise “new”

grounds in support of her motion. That is not a “new” argument warranting a sur-reply.

The Secretary should file a brief, if he chooses, on October 19, 2021, on the issue of collateral estoppel only and there should be no further briefing.

Dated: October 18, 2021

Respectfully submitted,

PARRISH LAW OFFICES

/s/ James C. Pistorino

James C. Pistorino

Attorneys for Plaintiffs

LEAR & LEAR PLLC

/s/ Phillip Wm. Lear

Phillip Wm. Lear

Attorneys for Plaintiff